No. 89-811

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARVIN NEIMAN d/b/a
CONCOURSE NURSING HOME,

Petitioner,

vs.

SECRETARY OF THE UNITED STATES DEPARTMENT
OF HEALTH AND HUMAN SERVICES, and
THE TRAVELERS INSURANCE COMPANIES,

Respondent.

REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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REPLY BRIEF

Contrary to the underlying theme of Respondents' Brief, the issue set forth in the instant case – whether a party may be wholly deprived of a forum, both administrative and judicial, for review of an administrative agency's frustration of that party's access to the administrative review process – is of far reaching significance. Judge Sifton of the Eastern District of New York, and the Second Circuit, through its affirmance, have expanded the holdings *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404 (1983), and *Schweiker v. Chilicky*, ____ U.S. ____, 108 S.Ct. 2460 (1988) to the Medicare context. Thus, *Bivens* actions have been severely limited, if not precluded, for a due process violation by a federal actor in the Medicare context. *See, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 667, 106 S.Ct. 2022 (1986); *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264 (1979) (Bivens action extended to Fifth Amendment context).

In fact, the issue of this case reaches beyond the Medicare context to all areas governed by administrative agencies. It is clear that the lower federal courts are struggling in this area and this case presents the ideal opportunity for this Court to set forth some guidance.

The fact that this type of "frustration" by an administrative agency is found in other administrative areas is aptly demonstrated by *Ysasi v. Rivkind*, 856 F.2d 1520 (Fed. Cir. 1988). Ysasi, an American citizen, was stopped while driving his truck by a border patrol agent (a division of the Immigration and Naturalization Service, "I.N.S."). When the agent learned that Ysasi was illegally transporting his brother-in-law, an illegal alien, he seized Ysasi's truck. Ysasi went through a number of prescribed administrative mechanisms in an attempt to get his truck back. In following the procedures carefully, he (1) requested and was granted an administrative interview; (2) filed an administrative claim; and (3) requested a bond waiver.

However, instead of following the prescribed administrative procedures, I.N.S., without considering plaintiff's request for

waiver of bond, remitted plaintiff's truck through a summary forfeiture proceeding to a company which had in the meantime filed a lien against it. The court held that although a comprehensive statutory and regulatory scheme was available, Ysasi was entitled to judicial review where the administrative agency itself had "frustrated" his use of the scheme.[1] *Ysasi*, at 1528.

This situation is identical to the circumstances presented in the instant case. Concourse was routinely denied all of its Part B claims by Travelers Insurance Company.[2] Concourse, like Ysasi, attempted to avail itself of the available administrative process by appealing the denials. However, Travelers refused to process the appeals applications, thus completely "frustrating" Concourse's attempts to use the administrative process. Concourse was left with no other recourse except the judicial system, which has also denied it access for review.

Clearly, the situation wherein a plaintiff is "frustrated" in pursuit of administrative remedies is not so singular that a decision by this Court would be "of little continuing importance." (Respondent's Brief, P. 8) On the contrary, such a decision would provide a barrier for abuse of authority by *all* administrative agencies in administration of the statutory schemes designed to protect the individual in the absence of judicial protections.

Moreover, this case is not appropriate for application of the regulation/application dichotomy set forth in *United States v. Erika, Inc.*, 456 U.S. 201, 102 S.Ct. 1650 (1982), *Bowen v.*

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[1] *Ysasi* thus carved a specific exception to *Shweiker v. Chilicky*, *supra*. (wherein the Court refused to allow a *Bivens* action for an alleged Fifth Amendment violation by the state official who administered the social security disability benefits program).

[2] Respondent alleges that the majority of petitioner's bills were in fact processed (*See*, Respondent's Brief, p. 4). It should be noted that this was never found by the court below, and was fiercely contested by petitioner. Respondent should not now be allowed to rely on such unfounded allegations. Moreover, the numbers are clearly inaccurate. Even if taken on its face, the Secretary only accounts for 376 of the alleged 2,200 bills not processed.

Michigan Academy of Family Physicians, 476 U.S. 667, 106 Sup. Ct. 2023 (1986), and *Kuritzsky v. Blue Shield of Western New York*, 850 F.2d 126 (2d Cir. 1988), *cert. denied*, 109 S.Ct. 787 (1989). That methodology, which provides either administrative or judicial review for all claims, only makes sense where all the actors "play fair." But where a party "frustrates" the administration of the administrative scheme, and judicial review is not enumerated by the Medicare statute, then federal jurisdiction against the wrongdoer is appropriate under *Bivens*. Such is the situation at hand.

Finally, from the beginning of this case, the government has persistently refused to recognize that Travelers Insurance Company is being sued as a party in its individual capacity. The very basis of a *Bivens* action is to sue the *individual* actors acting "under color of [federal] law." The government is not responsible for defending Travelers and its argument that it is the "real party in interest" is fallacious. As such, Petitioner's argument for diversity jurisdiction must hold fast since Travelers is Connecticut corporation while plaintiff is located in New York State. (Petitioners Brief p. 7, n. 3).

In a recent decision of the United States District Court of New Jersey, (rendered subsequently to the instant Petition) the District Court rejected the Secretary of Health and Human Services arguments that it was the "real party of interest" and that the carrier only a nominal defendant. In that case the government was not named as a defendant and did not officially intervene in the action. The Court found that "the government's only connection with this action is to represent [the carrier]." *Lifechem, Inc. v. The Prudential Insurance Co. of America*, No. 89 Civ. 2941 (N.J.D.C. December 12, 1989). Significantly, the Court acknowledged that diversity of citizenship would have provided jurisdiction for the case had the carrier been of different state citizenship than plaintiff. *Lifechem*, at 10.

For the reasons stated above and those stated in the initial brief in support of the Petition for Certiorari, this Court should

grant certiorari to review the Court of Appeal's decision which, in effect, wholly denied petitioner *any* forum for review of its claims.

Respectfully submitted,

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